To be Board
Returned 26

(2)

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

No. 90-1213

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

LINDA McMAHON, DIRECTOR, STATE DEPARTMENT OF SOCIAL SERVICES AND STATE DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

vs.

VICTORIA GRIMESY, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Peter Reid
Legal Aid Society
Of San Mateo Co.
298 Fuller St.
Redwood City, CA 94063
(415) 365-8411

Brenton Rogozen
Legal Aid Society
Of Santa Clara Co.
480 N. First St.
San Jose, CA 95112
(408) 998-5200

Robert D. Newman
Counsel of Record
Western Center On
Law & Poverty,
Inc.
3535 W. 6th St.
Los Angeles,
CA 90010
(213) 487-7211

Evelyn Frank
Legal Aid Society
Of Alameda Co.
1440 Broadway
Oakland, CA 94612
(415) 465-3833

Attorneys for Plaintiffs/Respondents

RESTATEMENT OF QUESTION PRESENTED

Should a court of appeal hear a challenge by a defendant/third-party plaintiff to a judgment for the plaintiff in an impleader case where the defendant/third party plaintiff never files a notice of appeal or a notice of cross-appeal, but where the third-party defendant files a timely notice of appeal.

TABLE OF CONTENTS

	Page
RESTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	3
JURISDICTION	4
STATUTES INVOLVED	4
STATEMENT OF THE CASE	6
ARGUMENT	13
I. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH SETTLED PRINCIPLES OF LAW THAT THE REQUIREMENTS ON FILING A TIMELY NOTICE OF APPEAL ARE MANDATORY AND JURISDICTIONAL	13

Page

II. THE COURT SHOULD NOT GRANT REVIEW TO RESOLVE A SUPPOSED CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION BELOW AND THE FIFTH CIRCUIT'S DECISION IN A 1980 CASE, SINCE THAT EARLIER DECISION HAS ALREADY BEEN DISCREDITED BY OTHER, LATER DECISIONS. 17

III. THE DISTRICT COURT'S FINAL JUDGMENT DOES NOT CONFLICT WITH FEDERAL LAW ON THE ADMINISTRATION OF AFDC PROGRAMS. 28

CONCLUSION 30

TABLE OF AUTHORITIES

	Page
Cases	
Anthony v. Petroleum Helicopters, Inc. 693 F.2d 495 (5th Cir. 1982)	18
Browder v. Directors, Illinois Dept. of Corrections, 434 U.S. 257 (1978)	16
Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981)	23,24 25
Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)	16
Engelman v. Amos, 404 U.S. 23 (1971)	28
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	19,20
Ford Motor Credit Co. v. Aetna Casualty and Surety Co., 717 F.2d 959 (6th Cir. 1983)	12
Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982),	16
Grimesy v. Huff, 876 F.2d 738 (9th Cir. 1989)	3
Hallstrom v. Tillamook Cty., ___ U.S. ___, 110 S.Ct. 304, 107 L.Ed 2d 237 (1989)	30

Page

Kelley v. Tyk Refractories Co., 860 F.2d 1188 (3rd Cir. 1988) 22

Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980) 17,18,21,23

Massachsetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976) 16,17

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 30

Reyna v. McMahon, 180 Cal.App.3d 220, 225 Cal.Rptr. 405 (1986) 29

Savage v. Cache Valley Dairy Ass'n, 737 F.2d 887 (10th Cir. 1984) 22

Stockstill v. Petty Ray Geophysical, 888 F.2d 1495 (5th Cir. 1989) 22,23

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1987) 2,20,21,27

United States v. American Ry. Exp. Co., 265 U.S. 425 (1924) 16

United States v. Robinson, 361 U.S. 220 (1960) 16

Young Radiator Co. v. Celotex Corp., 881 F.2d 1408 (7th Cir. 1989) 22

	Page
Statutes	
42 U.S.C. § 602	28
42 U.S.C. § 602(a)(2)	7
42 U.S.C. § 602(a)(39)	7,9
42 U.S.C. § 606(b)	29
42 U.S.C. § 607	29
Tax Reform Act of 1986, Pub. L. No. 99-514	9,12
Calif. Welf. and Inst. Code § 11315	29
Calif. Welf. and Inst. Code § 11450(b)	29
Rules	
Federal Rules of Appellate Procedure,	
Rule 3(a)	4
Rule 3(c)	20
Rule 4	4,5,6,15
Rule 4(a)	1
Rule 4(a)(1)	2,10,14,27
Rule 4(a)(3)	2,11,14,27
Rule 4(a)(5)	15
Rule 26(b)	6,15
Regulations	
45 C.F.R. § 233.20(a)(3)(xviii)	8

INTRODUCTION

Defendant California officials ("State") filed timely notices of appeal from two orders in this case. The State, however, chose not to file any notice of appeal or cross-appeal from the judgment entered in December of 1986. As its belated excuse, the State now maintains that in impleader cases a defendant/third-party plaintiff need not file any notice of appeal from a judgment for plaintiff so long as the third-party defendant files a timely appeal.

There is no reason why this Court should take review of this case. The Ninth Circuit's opinion is consistent with settled principles of law. The requirements of Rule 4(a) of the Federal Rules of Appellate Procedure are clear and unambiguous on the filing of a timely notice of appeal. Moreover, a long line of this Court's decisions have reaffirmed that filing a notice of appeal is a

"mandatory and jurisdictional" prerequisite.

The State contends that this case should be reviewed to resolve a conflict between the decision by the court below and the Fifth Circuit in Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). Yet, the unduly lenient approach of Kicklighter towards the requirements of Rule 4 has been totally discredited by later decisions, in particular, this Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). The State has failed to cite a single, recent appellate opinion that considers Torres but then reaches a different conclusion than the court below.

In any event, this case is not the proper one to raise the issue of whether the requirements of Rule 4(a)(1) and (3) are jurisdictional. A far better case would be one where the defendant/third-

party plaintiff at least had some excuse for not filing a notice of appeal.

Finally, the State argues that the decision of the court below will create a conflict with its obligations under federal law regarding the administration of the Aid to Families with Dependent Children ("AFDC") program. On the contrary, a state always retains the option to provide at its own expense greater welfare benefits than permitted under federal law. Indeed, California has exercised this option in several areas of its AFDC program.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported as Grimesy v. Huff, 876 F.2d 738 (9th Cir. 1989). Because the issue in this case involves the State's absolute failure to file either a notice of appeal or cross-appeal, there are no relevant district court opinions on this issue.

JURISDICTION

For the reasons discussed below, the Court does not have jurisdiction to hear the State's petition for writ of certiorari because the State did not file a notice of appeal or cross-appeal from the order entered by the district court on December 22, 1986, in plaintiffs' favor.

STATUTES INVOLVED

Rule 3(a) of the Federal Rules of Appellate Procedure provides, in relevant part:

> An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

Rule 4 of the Federal Rules of Appellate Procedure provides, in relevant

part:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted...

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires...

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time

> may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 26(b) of the Federal Rules of Appellate Procedure provides, in relevant part:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

STATEMENT OF THE CASE

This case began as a challenge to a state law and its implementing regulation that terminated or reduced the benefits under California's Aid to Families with Dependent Children ("AFDC") program for teenaged parents who were living with their own parents. According to the

challenged rule, sometimes known as the "grandparent deeming" rule, the income of grandparents had to be counted in determining the eligibility for aid of all eighteen-year-old parents living with them. Plaintiffs and respondents Victoria Grimesy, et al., claimed that the grandparent deeming rule violated 42 U.S.C. §§ 602(a)(2) and (a)(39) because it should have been applied only to those eighteen-year-old parents living with their own parents, attending school and expecting to graduate before age 19.

Plaintiffs originally filed suit in state court against defendants and petitioners Linda McMahon, Director of California Department of Social Services, Jesse Huff, Director of California Department of Finance, and their respective state agencies ("State"). Pet.App. 5-6. The State removed the action to the district court. Petition

for Removal, C.R.1.[1] It simultaneously filed a third-party complaint against Otis R. Bowen, Secretary of the United States Department of Health and Human Services ("HHS"), claiming that its grandparent deeming rule had been enacted to comply with federal regulations, 45 C.F.R. § 233.20(a)(3)(xviii). Third-Party Complaint at 2-3, C.R. 4.

On June 25, 1986, the district court granted motions by both plaintiffs and the State for partial summary judgment. Order Granting Summary Judgment at 1-2, C.R. 32. The district court permanently enjoined the State from continuing to implement the grandparent deeming rule and HHS from taking any action against the State for its nonenforcement of this rule. Id. at 2-4. The court also instructed the parties to attempt to

---

[1] The abbreviation "C.R." followed by a number corresponds to the docket number assigned to a pleading in the clerk's record in the district court.

reach an agreement on retroactive benefits. Id. at 4.

On July 17, 1986, the State filed a timely notice of appeal from the order granting permanent injunctive relief. Defendant's Notice of Appeal, C.R. 33. As was explained in the Docketing Statement to the Ninth Circuit, the State filed this notice of appeal "to give the federal agency (third-party defendant) a forum" to "defend its regulation." The State added that: "If the federal agency does not file its own Notice of Appeal or otherwise appear, the State will dismiss its appeal." HHS subsequently filed its own notice of appeal. Third Party Defendant's Notice of Appeal, C.R. 37.

On October 22, 1986, Congress enacted the Tax Reform Act of 1986, Pub.L. No. 99-514, which amended 42 U.S.C. § 602(a)(39) to prohibit grandparent deeming for all eighteen-year-old parents. In view of this change

in the law, both HHS and the State subsequently dismissed their appeals from the order granting permanent injunctive relief. HHS' Motion to Dismiss Appeal; State's Motion to Dismiss Appeal.

Meanwhile, plaintiffs and the State were able to agree on an order regarding retroactive benefits. Filed on December 22, 1986, this order (or more appropriately, final decision) contained provisions on how the State should identify class members, send them notices and claim forms, process their claims for reimbursement, and report on the processing of these claims for reimbursement. Pet. App. 25-32. The last section of this order provided that HHS shall not impose any sanctions or deny federal financial participation to the State for its compliance with the other terms of this order. Pet. App. 31.

Pursuant to Fed.R.App.P. 4(a)(1), the State had 60 days to file a notice of

appeal from the December 22 order. The State never filed such a notice. Third-party defendant HHS filed its notice of appeal on the fifty-ninth day, February 19, 1987. Notice of Appeal, C.R. 53. Pursuant to Fed.R.App.P. 4(a)(3), the State then had an additional 14 days to file a notice of cross-appeal. Once again, it never filed such a notice.

On July 17, 1987, the district court awarded attorney's fees to plaintiffs against the State. Order Granting Attorneys' Fees. Notably, the State did file a timely notice of appeal from this fee order. State's Notice of Appeal at 2.

HHS proceeded with its appeal of the December 22 order on retroactive benefits. Throughout the appellate proceedings, HHS consistently argued that the award of retroactive benefits to plaintiffs was final because the State had not filed a timely notice of appeal.

See, e.g., Brief for Appellants to the Ninth Circuit at 34. Plaintiffs nonetheless took an active role in the defense of the district court's judgment, in part because they wanted to vindicate their interpretation of the law, and in part because they wanted the federal government to share in the State's payment of retroactive benefits. Plaintiffs were also concerned that the State would argue, as it does now, that a reversal of the judgment against HHS should apply to it as well.

On May 25, 1989, the Ninth Circuit Court of Appeals entered its original opinion, reversing the judgment for the State against HHS. Pet. App. 4-20. The court of appeals held that the Tax Reform Act of 1986 precluded any claim by AFDC recipients for underpayments of benefits resulting from the earlier implementation of the grandparent deeming rule. Pet. App. 9-20. In response to plaintiffs'

request to amend the opinion, the Ninth Circuit subsequently added one sentence to its opinion, clarifying that the opinion does not change the order pertaining to the State because of its failure to file a notice of appeal. Pet. App. 4, 20.

The State then filed a petition for rehearing. At no point in its petition did the State offer an excuse, much less an explanation, for its failure to file a notice of appeal as to the December order. On November 1, 1990, the court of appeals denied the petition for rehearing. Pet. App. 21-22.

ARGUMENT

I

THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH SETTLED PRINCIPLES OF LAW THAT THE REQUIREMENTS ON FILING A TIMELY NOTICE OF APPEAL ARE MANDATORY AND JURISDICTIONAL.

This case involves nothing more than one party's failure to comply with the plain rules of appellate procedure. In

its petition for writ of certiorari, the State omits any reference to the critical rule, namely Fed.R.App.P. 4. Rule 4(a)(1) generally requires that a notice of appeal in civil cases "shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from...." This time limit for filing a notice of appeal may be extended to 60 days in cases, like this one, where the United States or one of its officers or agents is a party. Rule 4(a)(3) further provides that:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

While the State filed timely appeals from two other orders in this case, it never filed a notice of appeal from the final decision regarding retroactive

benefits. The State did not bother to file a notice of appeal within 60 days after entry of the judgment on December 22, 1986. Nor did the State bother to file a notice of cross-appeal within 14 days after HHS filed its notice of appeal on February 19, 1987. Indeed, the State never sought an extension of the abovementioned time limits for filing a notice of appeal, probably because such a motion in the district court would have required a "showing of excusable neglect or good cause." See Fed.R.App.P.4(a)(5).

Having ignored the clear and unambiguous requirements of Rule 4, the State is, in effect, inviting this Court to do the same. Rule 26(b) of the Federal Rules of Appellate Procedure provides that "the court may not enlarge the time for filing a notice of appeal."

Several years ago, this Court warned: "if no notice of appeal is filed at all, the Court of Appeal lacks

jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982), quoting from Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978).[2] A unanimous Court has also stated:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

United States v. American Ry. Exp. Co., 265 U.S. 425, 435 (1924) (emphasis added); accord, Massachusetts Mut. Life

---

[2] See also Budinich v. Becton Dickinson and Co., 486 U.S. 196, 203 (1986); United States v. Robinson, 361 U.S. 220, 229 (1960).

Ins. Co. v. Ludwig, 426 U.S. 479, 480-81 (1976).

II

THE COURT SHOULD NOT GRANT REVIEW TO RESOLVE A SUPPOSED CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION BELOW AND THE FIFTH CIRCUIT'S DECISION IN A 1980 CASE, SINCE THAT EARLIER DECISION HAS ALREADY BEEN DISCREDITED BY OTHER, LATER DECISIONS.

Despite these settled principles of law, the State urges review of this case because the Ninth Circuit's opinion is supposedly in conflict with an eleven-year-old decision by the Fifth Circuit, Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). In Kicklighter, the court of appeals concluded that one of the jury instructions was clearly erroneous and so it remanded the case for a new trial on plaintiff's claims of negligence. Id. at 738-42. The Fifth Circuit did reverse the judgment not only against the appealing party, third-party defendant, but also the nonappealing

party, the defendant. Id. at 742-44. However, the Kicklighter court emphasized the "limited scope" and "narrowness" of its holding. Id. at 744 n.16. The Fifth Circuit even warned defendants that they "would be ill-advised to take no appeal, relying on a third-party defendant to successfully assert on appeal" grounds applicable to them. Id.; see also Anthony v. Petroleum Helicopters, Inc., 693 F.2d 495, 497-98 (5th Cir. 1982)(reemphasizing the narrowness of exception in Kicklighter, the Fifth Circuit refused to hear contentions by parties who did not file a protective appeal).

The principal reason for the holding in Kicklighter was the "injustice" of a different legal ruling for the appealing party versus the nonappealing party. 616 F.2d at 744. By the same reasoning, it would be an "injustice" to reverse the judgment for fewer than all the

plaintiffs or all the defendants in any other case so long as one party files a timely notice of appeal and subsequently obtains a reversal on appeal on a legal issue applicable to the other nonappealing parties.

Yet, this Court has repeatedly upheld inconsistent rulings in actions with multiple parties precisely because some of the parties did not file the requisite notices of appeal. For example, in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), this Court ruled that the doctrine of res judicata barred the relitigation of anti-trust claims by two plaintiffs who had not appealed the dismissal of their identical claims in an earlier suit. This Court brushed aside the fact that other plaintiffs in the earlier suit had successfully obtained a reversal of the adverse judgment on appeal. Writing for this Court, Justice Rehnquist stated: "It

is the generally accepted rule in civil cases that where less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing." Id. at 399 n.4 (citations omitted).

More recently, this Court in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), refused to extend the reversal of the judgment against fifteen plaintiffs to the remaining plaintiff in this employment discrimination suit. This last plaintiff's name did not appear on the notice of appeal due to a secretary's clerical error. Id. at 313. The plaintiff nonetheless claimed to have been listed on the notice of appeal by the designation of "et al." Finding that such a vague designation did not comply with the specificity requirements of Fed.R.App.P. 3(c), this Court declared:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Torres, 487 U.S. at 315.

Whatever persuasive force, if any, Kicklighter may have once enjoyed has been eroded by this Court's later decision in Torres. The State insists that Torres does not affect the "continuing vitality" of Kicklighter (Pet. at 9). The circuit court that wrote Kicklighter knows better. In "light of Torres," the Fifth Circuit recently stated that it is "questionable" whether it remains "good law" that an "initial notice of appeal is jurisdictional but a protective or cross-appeal is permissive and courts of appeal

may retain all parties in order to do justice." Stockstill v. Petty Ray Geophysical, 888 F.2d 1495, 1496 (5th Cir. 1989). The court in Stockstill refused to hear the defendant's appeal from the dismissal of its third-party claim even though the defendant was already before the court as an appellee. Id. at 1495-97. According to the Fifth Circuit, the defendant's failure was not filing "a protective notice of appeal." Id. at 1497.

Several circuit courts have held that the filing of a notice of appeal or cross-appeal is a mandatory, jurisdictional requirement in cases with multiple parties. See, e.g., Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1415-17 (7th Cir. 1989); Kelley v. Tyk Refractories Co., 860 F.2d 1188, 1199 n. 21 (3rd Cir. 1988); Savage v. Cache Valley Dairy Ass'n, 737 F.2d 887, 888-89 (10th Cir. 1984); Ford Motor Credit Co.

v. Aetna Casualty and Surety Co., 717 F.2d 959, 962 (6th Cir. 1983). Conspicuously absent from the State's petition is a single recent decision where a circuit court, after reviewing the holding in Torres, excused a party's failure to file any notice of appeal or cross-appeal.

The only other case on point cited by the State is an older decision by the Ninth Circuit itself, Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981). Like Kicklighter, Bryant was decided several years before Torres and so its continuing precedential value has also been questioned. See Stockstill v. Petty Ray Geophysical, 888 F.2d at 1496-97. In any event, the case at bar is distinguishable from Bryant.

The Ninth Circuit in Bryant pointed to three "unique" factors that justified its reversal of the judgment against the defendant/ third-party plaintiff even

though that party did not file a notice of appeal. 654 F.2d at 1343. First, the trial on the merits of the underlying issues in the case would be partially frustrated if the judgment against the nonappealing defendant was allowed to stand and consequently certain parties were not participants in the trial. Id. at 1342. Second, certain rulings by the district court could have misled the defendant/third-party plaintiff about the need for a cross-appeal. Id. Third, the case was certified as an interlocutory appeal which might have further misled the defendant on the need to appeal. Id. at 1342-43. Even so, the Ninth Circuit stressed the "narrow scope" of its holding, adding: "[i]t will be the unusual case where an appellee that fails to file a notice of appeal can challenge unfavorable aspects of a judgment." Id. at 1343.

The instant case has none of these

three "unique" factors. First, a reversal of the judgment only against the third-party defendant, HHS, will not impair any subsequent jury trial because there never was and never will be a trial in this case. On remand the district court can simply implement the terms of the December 22, 1986 decision requiring the State to pay retroactive benefits to plaintiffs.

Second, no order or ruling by the district court ever misled the State on its need to file a notice of appeal. On the contrary, the district court's decision disposed fully of the plaintiffs' remaining claims against the State and the State's separate claims for reimbursement from HHS.

Third, the appeal in this case was from the final judgment in the case. Thus, unlike Bryant, the State cannot claim that it was somehow misled on the need to file a notice of appeal because

the order was interlocutory.

In its petition (at 5-7), the State points to several instances where plaintiffs referred to themselves as appellees. This assertion is true, but irrelevant. The State cannot claim that it was ever misled by plaintiffs on the need to file a notice of appeal. Nor can the State pretend to have relied upon HHS to be its surrogate in this case. In fact, the State filed a notice of appeal (which was later dismissed) from the earlier permanent injunction in this case "out of a superabundance of caution so as to assure that the federal agency (third-party defendant) could argue the validity of its regulation on appeal, if it chose to do so." State's Motion to Dismiss Appeal at 2. Why did the State not file a similar protective notice of appeal as to the district court's later decision on retroactive benefits? No explanation has ever been supplied.

Even if the question still may exist after Torres as to whether the requirements of Fed.R.App. 4(a)(1) and (3) are jurisdictional in impleader cases, this case is not the one to resolve this question. At the outset, this Court will not benefit from a thorough discussion of the issue by the court below. The Ninth Circuit's opinion contains just one terse sentence that refuses to reverse the judgment against the State in plaintiffs' favor. Pet.App. 20.

Furthermore, the State is hardly the one to complain about the consequences of the requirements of Rule 4 being considered jurisdictional. Recognizing the need to file protective notices of appeal in this case, the State filed such a notice as to the earlier permanent injunction. The State simply elected not to appeal the final decision against it on retroactive benefits. Thus, a much

better party to raise the question of appellate jurisdiction would be one who at least could point to some countervailing considerations for not filing a notice of appeal.

III

THE DISTRICT COURT'S FINAL JUDGMENT DOES NOT CONFLICT WITH FEDERAL LAW ON THE ADMINISTRATION OF AFDC PROGRAMS.

There is no truth to the State's remaining argument that compliance with the district court's final judgment is "contrary to federal law" for AFDC programs (Pet. at 14). In the AFDC program, the federal government provides funding to states to share in the cost of assistance for those needy families who meet federal eligibility criteria. 42 U.S.C. § 602. A state is always free to provide AFDC assistance to people from its own funds where federal matching funds are unavailable. See, e.g., Engelman v. Amos, 404 U.S. 23, 24 (1971);

Reyna v. McMahon, 180 Cal.App.3d 220, 225 Cal.Rptr. 405 (1986).[3] California does so in several instances. Compare Calif. Welf. and Inst. Code § 11450(b) with 42 U.S.C. § 606(b) (California provides AFDC benefits to first-time pregnant women from date of verification, although federal participation is only available from the six month of pregnancy); compare Calif. Welf. and Inst. Code § 11315 with 42 U.S.C. § 607 (California provides AFDC benefits to certain families with unemployed children when no federal participation is available). Federal AFDC law does not prohibit the State from paying retroactive benefits to the plaintiffs.

---

[3] See also Brief for Appellants to the Ninth Circuit at 9, where HHS similarly asserts: "A state may provide welfare benefits that do not meet the federal eligibility requirements so long as the funding for such benefits is borne solely by the state."

CONCLUSION

The State wants this Court to loosen the requirements on the filing of an appeal. "In the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Hallstrom v. Tillamook Cty., ___U.S.___, 110 S.Ct. 304, 311, 107 L. Ed. 2d 237 (1989), quoting from Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980). The same observation holds true for the procedural requirements specified by this Court. The State's petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT D. NEWMAN
PETER REID
BRENTON ROGOZEN
EVELYN FRANK

By _____
ROBERT D. NEWMAN
Attorneys for Plaintiffs/
Respondents